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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 575

JOHN L. GILVARY,
Petitioner,

vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Ohio and BRIEF IN SUPPORT OF PETITION.

GLEN A. BOONE,
Attorney for Petitioner.

BERNSTEEN & BERNSTEEN,
M. L. BERNSTEEN,
J. E. MATHEWS,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of John L. Gilvary respectfully shows:—

ABRIDGED PRELIMINARY STATEMENT OF THE PROBLEM INVOLVED.

Action in an Ohio court by a railroad employee against his employer, the Cuyahoga Valley Railway Company, operating a railroad in interstate commerce, to recover for injuries from a defective coupler, in violation of the Federal Safety Appliance Act.

Defense that the immediate movement was intrastate and that the plaintiff was bound by a State Workmen's Compensation Law.

No compensation was ever applied for or accepted by plaintiff.

Common Pleas judgment for plaintiff reversed by a majority of a County reviewing Court of Appeals (one judge dissenting) and final judgment entered for Railroad, based on asserted applicability of compensation system. No opinion.

Highest Court of State (Supreme Court) divide three-three, thus automatically affirming the judgment in favor of the Railway. No opinion.

The petition in Common Pleas Court and all evidence and briefs rested the plaintiff's case wholly upon the Federal Act. *This denial of a Federal cause of action violates every recorded decision on the subject in this country, both State and Federal; and particularly those of this Court.* To uphold it would be subversive of the doctrine of this Court as to the paramount and exclusive nature of Federal rights, remedies and jurisdiction, as against State systems of compensation.

By a peculiarity of Ohio law this unique judgment rests upon the decision of two County court judges. Against their holding may be marshalled those of two Common Pleas judges, one Court of Appeals judge and three judges of the highest Court of the State.

The journal entry eliminated all non-Federal questions and rests solely on the issue as between the asserted Federal right and the interposed State scheme of compensation.

If the decision in question is to be accepted as law it will necessarily follow that in all cases of injury (whether tortious or merely accidental) of an employee of an interstate railroad in *intra*state commerce but in claimed violation of the Federal Safety Appliance laws, the jurisdiction heretofore exercised by the State and Federal courts will be transferred in like circumstances to the compensation tribunals of the several States.

OUTLINE OF CASE.

Petitioner (hereinafter called Gilvary) sued the respondent (hereinafter called the Railroad) in the Court of Common Pleas of Cuyahoga County, Ohio, to recover for a violation of the Federal Safety Appliance Act. Two judges of that Court, in successive trials, sustained his right and he recovered a verdict. The Railroad was admittedly a highway of interstate commerce. At the time of Gilvary's injury the movement of cars between which he was hurt was intrastate; but the coupler defect causing the injury was a clear violation of the Federal Safety Appliance Act. The defense was that his rights were controlled solely by the Workmen's Compensation Law of Ohio.

In the next higher Court (the Court of Appeals of Cuyahoga County, Ohio) two judges, constituting a majority of that Court (one judge dissenting), denied the Federal right, held that the State law furnished the exclusive remedy and entered final judgment in favor of the railroad.

On error the Supreme Court of the State, being the highest reviewing Court in Ohio, six judges participating divided equally, with the result, under Article 4, Section 2 of the Ohio Constitution, of affirming the judgment of the Cuyahoga County Court of Appeals. The journal entry of the Court of Appeals based the reversal and final judgment upon the sole ground that Gilvary, by signing a certain application or "election" at the time of entering the employ of the Railroad, had so subjected himself to the State scheme of compensation as to lose his rights under the Federal statute. All other grounds of error were overruled. The automatic affirmance of this judgment therefore leaves, as the sole continuing issue, the conflict between the Federal cause of action and the local scheme of compensation. No non-Federal issue remains in the case. The judg-

ment of the State intermediate Court, by denying the Federal right, was in direct conflict with the following decisions:

Texas & Pacific Railway vs. Rigsby, 241 U. S. 33;
Ross vs. Schooley, 257 F. R. 290 (Cert. Den. 249 U. S. 615);
Ward vs. Erie Railroad, 230 N. Y. 230 (Cert. Den. 256 U. S. 696);
Director General vs. Roland, 265 F. R. 138 (Manton, J.);
New York Central R. R. vs. Winfield, 244 U. S. 147.

In three of these cases this Court recognized directly, by its entry, a right of action where, as here, injury resulted from violation of the Federal Safety Appliance Act, and in two of them this right was distinctly held to supersede any local provision or substitute such as workmen's compensation.

Said State Court judgment was also in conflict with the controlling decisions of this Court in holding that Gilvary could be put to any "election" between the Federal right in question and a scheme of local compensation. These decisions are:

Erie Railroad vs. Winfield, 244 U. S. 170;
Employers' Liability Co. vs. Cook, 281 U. S. 233;
Baizley Iron Works vs. Span, 281 U. S. 222;
Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149.

The only statement of the grounds for the decision below is that contained in the journal entry of the Cuyahoga County intermediate court which appears at page 18, *infra*, Record page 5. The decision complained of involves a Federal question of substance previously determined by this Court, but such decision was manifestly not in accord with the applicable decisions.

LEGAL QUESTIONS PRESENTED BY THIS PETITION.

I.

A judgment of a State Court denying a cause of action under the Federal Safety Appliance Act and sustaining, as a defense thereto, the alleged operation of a State Workmen's Compensation Act, is in conflict with the principles established and enforced in the Supreme Court of the United States.

II.

Where an employee, upon entering the employ of a railroad, signs a written instrument called an "election," purporting to subject him to a State compensation law as to claims for injuries thereafter sustained "in intrastate commerce," such "election" is without legal vitality as to a cause of action arising upon a violation of a Federal Safety Appliance Act. This is particularly true where the language of such election does not purport to include rights based on such violations and by its language excludes from its operation cases covered by any Act of Congress.

JURISDICTION.

The jurisdiction of this Court is invoked on the authority of Section 237 Judicial Code, Subdivision (b), the plaintiff below having based his right of action upon a statute of the United States (Section 2, Title 45, United States Code), and such claim having been denied and the provisions of a State statute (G. C. 1465-98, Ohio General Code) substituted as the measure of his rights.

For convenience the section of the Federal Safety Appliance Act above cited is set forth.

The original Act was amended March 2nd, 1903, by the enactment of Section 1 as follows:

> "Section 1. That the provisions and requirements of the Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; *and the provisions and requirements hereof and of said Acts* relating to train brakes, *automatic couplers*, grab irons, and the height of drawbars shall be held to apply to *all trains, locomotives, tenders, cars*, and similar vehicles *used on any railroad engaged in interstate commerce*, and in the Territories and the District of Columbia, and to all other locomotives * * *."

Section 2 (of original Act):

> "That on and after January 1st, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

No question remains in the case as to Gilvary being seriously injured by having to go between the cars because of the failure of the automatic coupler to work.

The Ohio statute, General Code Section 1465-98, is set forth *infra* at page 17.

PRAYER.

In order to correct the error complained of and to the end that the right of petitioner to have the judgments of the said Supreme Court of Ohio and of the Cuyahoga County Court of Appeals (Eighth Judicial District) reversed, your petitioner prays that a writ of certiorari may be issued under the seal of this Court, directed to the judges of the Supreme Court of Ohio and the Cuyahoga County Court of Appeals of the Eighth Judicial District aforesaid, commanding them and each of them to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Supreme Court of Ohio in the case of "John M. Gilvary, plaintiff in error, vs. The Cuyahoga Valley Railway Company, defendant in error," being cause No. 23,947 in the Supreme Court and No. 12,597 in the Cuyahoga County Court of Appeals, to the end that the final decree and judgment of the said Supreme Court of Ohio and of said Court of Appeals may be reviewed by this Court as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate.

GLEN A. BOONE,
Attorney for Petitioner.

BERNSTEEN & BERNSTEEN,
M. L. BERNSTEEN,
J. E. MATHEWS,
Of Counsel.

THE STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

M. L. BERNSTEEN, being first duly sworn, says that he is one of the attorneys for John L. Gilvary and makes this verification for and in his behalf and is thereunto duly authorized; that he read the foregoing petition and that the allegations therein are true as he verily believes.

M. L. BERNSTEEN.

SWORN to before me and subscribed in my presence this 6th day of November, 1933.

(Notarial Seal) HANNAH FISHER,

Hannah Fisher—Notary Public.

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States of America; that I have prepared and examined the foregoing petition and that in my opinion the petition is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

GLEN A. BOONE.

In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. .....

JOHN L. GILVARY,
Petitioner,

vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

AS TO CAUSES OF ACTION BY RAILROAD EMPLOYEES UNDER FEDERAL ACTS THE FEDERAL POWER IS EXCLUSIVE AND PARAMOUNT AND LOCAL COMPENSATION SCHEMES ARE NOT A DEFENSE.

(a) The Basis of the Federal Right.

The Federal Safety Appliance Act established a cause of action in favor of an injured railroad employee irrespective of the kind of commerce in which he was engaged at the time of such injury.

Texas & Pacific Railway vs. Rigsby, 241 U. S. 33:

Van Devanter, *J.*:

> "Without the express leave of Congress it is not possible, while the Federal legislation stands, to make or enforce inconsistent laws giving redress for injuries to workmen *, * * any more than laws prescribing the character of the appliances that shall be maintained." (P. 41.)

"Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensations because of their disregard of regulations established primarily for safeguarding commerce between the States is a matter within the control of Congress." (P. 42.)

"Liability to private suit is or may be as potent a deterrent as liability to public prosecution." (P. 42.)

"Remedial action in behalf of intrastate employees and travelers must either be governed by the Acts of Congress *or else be left subject to regulation by the several States, with probable differences in the law* material to its effect *as regulatory of the conduct* of the carrier." (P. 42.)*

(b) Decisions Declaring the Paramount and Exclusive Nature of the Federal Right.

Ross vs. Schooley, 257 P. R. 290 (Cert. Den. 249 U. S. 615), directly involved a conflict between a cause of action under the Federal Safety Appliance Act and a State system of compensation which was pleaded in bar of the action. The defense was rejected on grounds identical with those quoted from the opinion in *Railway vs. Rigsby, supra.*

Ward vs. Erie Railway, 230 N. Y. 230 (Cert. Den. 256 U. S. 696), holding that:

"The purpose of the Federal Safety Appliance Act was not merely to impose a duty but also to create or preserve a right of action for the damages, and the right of action so established is immune from impairment except by Act of Congress."

"Although he has no remedy under the Federal Employers' Liability Act, an employee of a railroad

* Italicized portions of quoted matter are emphasized by the writers of this brief.

engaged in interstate commerce who is injured while switching cars, not in aid of any interstate movement, has a right of action for his damages where the injury was caused through violation by the railroad of the Federal Safety Appliance Act, and the Workmen's Compensation Act of the State does not impair such right."

By Cardozo, *J.*:

"Enough is there to forbid the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, should be dependent for its efficacy upon the pleasure of the States."

Director General vs. Roland, 265 F. R. 138 (C. C. A. 2), Manton, *J.*, held that no scheme of State compensation was available as a defense to a cause of action founded upon a Federal Safety Appliance Law. This holding is of additional significance in that it inferentially overrules a previous contrary decision by the same Court in *Railway vs. Peck*, 255 F. R. 261.

Every State decision upon the subject adopts the same doctrine:

Kenna vs. Railway, 284 Ill. 384;
Kramer vs. C. & N. W. Ry., 148 Minn. 310;
Southern Pacific Railway vs. Henderson, 208 S. W. 561 (Tex.);
Flannigan vs. Railway, 108 Kan. 133;
Miller vs. Reading, 292 Pa. 44.

The above decisions are but a corollary of the general doctrine established in this Court, that the Federal power not only embraces interstate commerce as such, but such phases of intrastate commerce as are interwoven with or inseparable from interstate commerce:

Southern Railway vs. Railway Commission, 236 U. S. 439;
Southern Railway vs. U. S., 222 U. S. 20;
Houston, etc. Railway vs. U. S., 234 U. S. 342;
Simpson vs. Shepard, 230 U. S. 352;
Stafford vs. Wallace, 258 U. S. 495;
Minnesota Rate Cases, 230 U. S. 352, 399.

II.

THE SO-CALLED "ELECTION" BY GILVARY WAS INOPERATIVE UNDER THE ESTABLISHED DOCTRINE OF THIS COURT.

(a) The States are without power to put the parties to an election in these circumstances:

Employers Liability Co. vs. Cook, 281 U. S. 233;
Erie Railway vs. Winfield, 244 U. S. 170;
Director General vs. Roland, 265 F. R. 138 (Manton, J.).

(b) The form or manner of assent is immaterial, whether it be expressed or implied, or whether based on a conclusive statutory presumption or the execution of a formal instrument:

Baizley Iron Works vs. Span, 281 U. S. 222;
Employers Liability Co. vs. Cook, supra;
Erie Railway vs. Winfield, supra.

(c) The actual "consent" signed by Gilvary when first entering the railroad's employ, under the provisions of the Ohio Statute (G. C. 1465-98) does not bear the construction that is claimed by the railroad, since it clearly indicates a purpose to leave untouched any Federal right of Gilvary.

Of these in the above sequence:

(a) In *Employers Liability Co. vs. Cook, supra*, this Court (reversing the Federal Court of Appeals), definitely rejected the doctrine that employer and employee may, by

voluntary act, elect to vest a State Compensation Commission with power to adjudicate rights Federal in origin and nature. In that case the parties had formally submitted themselves, in advance of the accident, to the operation of the State Act. The employee was injured by a maritime tort. The Federal Court of Appeals in that case (31 F. 2, 497) followed the decision relied upon by the Railroad here (and presumably followed by the Cuyahoga County Court of Appeals), to-wit, *Berry vs. Donovan & Sons*, 120 Me. 457, and held that when the parties voluntarily submitted their future claims to the system of State compensation, a Federal liability would be included just as if it were a matter of local origin. The reversal of that decision by this Court was accompanied by the declaration that:

> "A State Workmen's Compensation Law, though elective in form, is not applicable in the case of an employee injured while unloading a vessel."

It would seem clear that the reversal of the Federal Court of Appeals decision, which relied upon and qualifiedly approved the principle of contract as advanced in the *Berry* case, is a rejection by this Court of any such doctrine. The error of the *Berry* case has been further demonstrated by the Court of Civil Appeals of Texas in *Bell vs. Southern Casualty Co.*, 267 S. W. Rep. 531. While the *Berry* case was a maritime case and was at no time an authority in favor of the Railroad's position here, it was the sole available decision tending to uphold the Railroad argument as to the asserted "contract," all of the directly applicable decisions, both State and Federal, being opposed to the Railroad view.

So, in the *Winfield* case, this Court held in the syllabus (244 U. S. 170):

> "The operation of the Federal Employers' Liability Act of April 22nd, 1908, (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1916, Sec. 8657), governing the lia-

bility of interstate railway carriers for the death or injury of their employees while employed in interstate commerce, *cannot be interfered with by a state either by putting the carriers and their employees to an election* between the provisions of that statute and a state Workmen's Compensation Act, as is attempted by New Jersey Laws 1911, Chap. 95, *or by imputing such an election to them by a statutory presumption.*"

In *Director General vs. Roland, supra*, the Second Federal Court of Appeals held (Manton, *J.*):

> "It is beyond the power of any State to interfere with the operation of a Federal Act such as by putting carriers and their employees to an election between its provisions and those of the State acts, or imputing an election to them through a statutory presumption. The Federal Act is intended to operate uniformly in all the States as respects its application, rights and remedies conferred and is therefore paramount and exclusive."

Since the two judges of the Cuyahoga County Court of Appeals whose opinion finally emerged as controlling probably followed the repudiated *Berry* case, *supra* (there being no other theory advanced in the Railroad briefs), it is clear that the denial of Gilvary's Federal right was based upon a ground declared unsound by this Court.

The New York Appellate Division, in *Christenson vs. Morse Co.*, 214 N. Y. S. 734, a case of *actual* acceptance of partial benefits by the employee, adhered to the principles announced by this Court and held that the State Commission was without authority where the right involved was essentially maritime and hence Federal. The New York Court, as well as some of the State decisions cited *supra*, recognized that the recovery allowed under compensation systems was not in the course of the common law, being different in respect both as to substance and remedy; and this Court, in *Knickerbocker Ice Co. vs. Stewart*, 239 U. S. 149, held that to allow the States to apply variant

remedies for Federal liability would amount to a delegation of the power of Congress to the several States.

(b) Form of consent immaterial.

It will be apparent that all the above holdings are in consonance with the long line of decisions by this Court in maritime matters, where a conflict arose between the local compensation law and a Federal cause of action:

Southern Pacific Railway vs. Jensen, 244 U. S. 205;
State Industrial Commission vs. Nordenholt Corp., 259 U. S. 263.

(Again holding that the presence or absence of "agreements" by the parties to be bound by the compensation law was immaterial.)

Knickerbocker Ice Co. vs. Stewart, *supra*.

This Court has held that the States may absorb both employer and employee into state compensation, either with or without their consent:

Mountain Timber Co. vs. Washington, 243 U. S. 219;
Hawkins vs. Bleakley, 243 U. S. 210;
New York Central R. R. vs. White, 243 U. S. 188.

Hence the argument that there is a difference between elective and compulsory compensation laws is of no force.

The consent of the parties or the exercise of a so-called "election" by them cannot transfer the jurisdiction of a Federal right to a State executive tribunal; and as already shown by the applicable decisions, the State cannot, by legislation, put the parties to an election as between the two organically different systems of law. In the *Cook* case cited *supra* it was said:

> "The State lacked power to prescribe the rights and liabilities growing out of the accident. The fact that the compensation law of the State was elective in form does not aid the respondents. *The employer did*

not surrender rights guaranteed to him by the Federal law merely by electing to accept one of two kinds of liability in respect of matters within the State's control, either of which she had power to impose upon him.''

The above quoted language embodies the controlling principle applicable to the case at bar. The two judges of the Cuyahoga County reviewing court were apparently unable to see that the "election" of Gilvary applied solely to one of two kinds of liability within the control of the State of Ohio, and did not embrace a liability beyond the control of that state. See also *Baizley Iron Wks. vs. Span, supra.*

(c) The actual "consent" signed by Gilvary when he entered the Company's employ was as follows: (Record, pages 52-53)

THE INDUSTRIAL COMMISSION OF OHIO
COLUMBUS, OHIO.

SECTION 51 OF COMPENSATION ACT
(Section 1465-98 G. C.)

The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

ACCEPTANCE AND NOTICE OF ELECTION BY EMPLOYER AND EMPLOYES UNDER SECTION 51 OF WORKMEN'S COMPENSATION ACT.

TO THE INDUSTRIAL COMMISSION OF OHIO:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and its undersigned employes, working only in this state, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, hereby elect that their respective rights and liabilities growing out of injury or death to such employes

or any of them, or their dependents in case of death, shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury or death is sustained while such employer or employes are engaged in intrastate commerce.

Said employer and employes hereby severally request the Industrial Commission of Ohio to approve their election to operate under the Workmen's Compensation Law of Ohio.

EMPLOYE: John Gilvary.

Oct. 12, 1928

The journal entry of the County Court of Appeals giving effect to this document was as follows (Record, pp. 4-5):

> "This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed, for the reason that the acceptance and notice of election by the employer and employee contract approved by the Industrial Commission of Ohio is a complete bar to a right of recovery in this action and is therefore contrary to law, and final judgment is hereby rendered for plaintiff in error; no other error appearing on the record, and this cause is remanded to said Court of Common Pleas to carry this judgment into execution. The defendant in error excepts."

Since the statute and the election are embraced in one instrument they are to be construed together. It is maintained:

> 1. The instrument expressly excludes any injury to Gilvary where a rule of liability or method of compensation was declared by Congress, and insofar as not forbidden by any Act of Congress.

2. The reference to injury in intrastate commerce manifestly meant injuries which did not involve infractions of Federal law and did not bring the State machinery into conflict with the Federal right.

3. The work at which Gilvary was engaged (although an intrastate movement) was so intimately connected with interstate commerce as to bring him within the protection of Federal law. This protection was precisely the same, so far as the Federal Safety Appliance Act was concerned, as if he had been in interstate commerce. The language of the consent by the parties only sought to include their "*mutual connection with intrastate work*" *where it was* "*clearly separable and distinguishable from interstate commerce.*" Since Congress, by statute, and this Court, by decision, have embraced Gilvary's intrastate activity under the same protection given interstate commerce employees, it is clear that the Ohio statute and the consent drafted thereunder expressly exclude an injury in circumstances that are not "clearly separable and distinguishable from interstate commerce."

4. Since the Ohio statute sought to exclude all exercise of state jurisdiction where "forbidden by any Act of Congress," the exercise by Congress of its power over the agencies, human and mechanical, of intrastate commerce as shown by the Federal Safety Appliance Act, was in legal effect a prohibition to the States to interfere in that field.

> "Inhibitive action by Congress is not essential to exclude action of the States as to interstate commerce. It is sufficient if the Acts of Congress occupy the field of regulation."
>
> *Southern Railway vs. Reid*, 222 U. S. 424;
> *Ward vs. Erie Railroad*, 230 N. Y. 230.

CONSEQUENCES OF UPHOLDING THE DECISION OF THE OHIO COURTS.

If the decision of the State court is to be accepted as the law the following results will accrue:

1. The Federal cause of action and the measure of damages provided therefor will be absorbed into variant State schemes of compensation or may be otherwise subjected to modification.

2. The "punitive sanction" of a civil liability which was stressed in the opinion in the *Rigsby* case will pass from Federal to State control.

3. The right of railroads to defend against claims of safety appliance violations by interposing all proper defenses, including contributory negligence, will be removed and such cases, whether the railroad is at fault or not, will become a basis for some form of State compensation. This is a complete overturning of the law as it now exists in the several States where railroads are within workmen's compensation as to intrastate business.

4. Both employer and employee can hereafter be "put to an election" as between Federal rights (or defenses) and State rights (or defenses), in open disregard of the doctrines of this Court, clearly stated and repeatedly applied.

5. If the element of "consent" or "voluntary submission" is to be a determining factor in the abandonment of Federal rights (or defenses) in Federal Safety Appliance cases, then a like result must obtain as to other Federal rights, especially those under the Federal Employers' Liability Act and under maritime law. This requires that the doctrine of the several cases hereinbefore cited should, as a matter of consistency, be overruled.

6. The substitution of a State system of adjudication and compensation with respect to a Federal right, remedy

and defense would produce the lack of uniformity denounced in the cases cited; would constitute a delegation of legislative power by Congress to the several States; would clothe subordinate executive State tribunals with judicial power over such subjects and would enable employers to stipulate against their non-observance of Federal Safety Appliance regulations by substituting, for the full liability imposed by Federal law, a modified and partial award computed upon an actuarial basis and having no reference to the loss sustained by a given injured employee.

Respectfully submitted,

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